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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>MICHAEL GEORGE ST. MARTIN,<br><br>Defendant and Appellant. | D055287<br><br><br><br>(Super. Ct. No. MH99339) |

APPEAL from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed in part, reversed in part, and remanded with directions.

## INTRODUCTION

A jury found Michael George St. Martin to be a sexually violent predator (SVP) under the Sexually Violent Predator Act (the Act). (Welf. & Inst. Code, § 6600 et seq.)[1]

1 Further statutory references are also to the Welfare and Institutions Code unless otherwise indicated.

The superior court recommitted him to the Department of Mental Health (Department) for an indeterminate term.

St. Martin appeals, contending his recommitment is unlawful and violates his due process rights because the mental health evaluations used to initiate this case were based on a standardized assessment protocol (protocol) since determined to contain underground regulations.[2] Alternatively, he contends his trial counsel provided ineffective assistance by failing to file a writ petition challenging the superior court's denial of his motion to dismiss this case because of the faulty evaluations.

In addition, St. Martin contends the Act violates the state and federal equal protection clauses, and we must reverse and remand this case to the superior court for further proceedings in light of the California Supreme Court's decision in *People v. McKee* (2010) 47 Cal.4th 1172 (*McKee*). Solely for purposes of preserving his right to later federal court review, St. Martin also contends the Act violates the federal constitution's due process, ex post facto, and double jeopardy clauses.

We reverse the superior court's judgment as to the *McKee* equal protection claim and remand the matter to the superior court with directions to suspend further proceedings until the *McKee* case is finally resolved, and then to conduct further proceedings consistent with the final resolution. In all other respects, we affirm the superior court's judgment.

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[2] An underground regulation is a regulation not adopted in substantial compliance with the Administrative Procedures Act (Gov. Code, § 11340 et seq.). (*People v. Medina* (2009) 171 Cal.App.4th 805, 813-814 (*Medina*).)

## BACKGROUND

*Overview of the Act*

"The Act allows for the involuntary civil commitment of individuals who, as a result of a diagnosed mental disorder, are likely to continue engaging in sexually violent criminal behavior even after serving a prison sentence. [Citation.]" (*In re Wright* (2005) 128 Cal.App.4th 663, 670 (*Wright*).) As a procedural prerequisite to the filing of a proceeding under the Act, two mental health professionals designated by the Department, using a protocol developed by the Department, must evaluate the person and determine whether the person is an SVP. (§ 6601, subd. (c) & (d).)

If the two mental health professionals disagree about whether the person meets the criteria, the Department must appoint two independent professionals to evaluate the person. (§ 6001, subd. (e).) If the two initial evaluators, or the two independent evaluators, agree the person is an SVP, the Department must forward a request for commencement of a proceeding under the Act to the county of the person's last conviction. (§ 6601, subd. (d), (f), (h) & (i).)

If the county's designated counsel concurs with the Department's recommendation, counsel files a petition for commitment or recommitment[3] in the superior court. (§ 6601, subd. (i).) The superior court then conducts an adversarial hearing to determine whether there is probable cause to believe the person is likely to engage in sexually violent

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3 The Act details the procedures for an initial commitment proceeding; however, the procedures also apply to a recommitment proceeding to the extent possible. (*Medina, supra,* 171 Cal.App.4th at p. 812; *People v. Ward* (2002) 97 Cal.App.4th 631, 634 & fn. 9.)

predatory criminal behavior upon release. (§ 6602, subd. (a).) If the court finds such probable cause, it sets a trial. (*Ibid*.) If, at trial, the trier of fact determines beyond a reasonable doubt the person is an SVP, the superior court must commit the person to the Department for appropriate treatment and confinement in a secure facility. (§ 6604.)

*St. Martin's Criminal History and Initial Commitment*

Between 1983 and 1993, St. Martin pleaded guilty to five separate sexual offenses against boys under 14 years old. He committed the last two offenses while released from custody pending final judgment of one of the earlier offenses. Upon his release from prison, he agreed to be committed to the Department under the Act for two years.

*St. Martin's Recommitment Proceedings*

In 2006, before the expiration of St. Martin's initial commitment, the district attorney filed a petition to recommit him. Supporting the petition were evaluations, completed in 2005, from two psychologists, Dr. Mary Jane Alanbaugh and Dr. Mark Scherrer, indicating their belief St. Martin was an SVP. The superior court subsequently conducted a probable cause hearing, at which Dr. Alanbaugh testified, and found there was probable cause to believe St. Martin was an SVP.

Several months later, after the Act was amended to provide for the indeterminate commitment of SVP's (see *McKee*, *supra*, 47 Cal.4th at p. 1183), the district attorney filed an amended recommitment petition seeking St. Martin's recommitment for an indeterminate term. Meanwhile, the parties discovered Dr. Alanbaugh's 2005 evaluation of St. Martin mistakenly included another person's social history information. When

Dr. Alanbaugh reevaluated St. Martin, she changed her opinion and no longer believed he was an SVP.

Consequently, in 2007, two other psychologists, Dr. Jack Vognsen and Dr. John Hupka, evaluated St. Martin. Both doctors believed St. Martin was an SVP. The superior court subsequently conducted a second probable cause hearing, at which both Dr. Vognsen and Dr. Hupka testified. The superior court once again found probable cause to believe St. Martin was an SVP.

In July 2008, Dr. Vognsen, Dr. Hupka, Dr. Scherrer, and Dr. Alanbaugh each reevaluated St. Martin. Dr. Vognsen, Dr. Hupka, and Dr. Scherrer continued to believe St. Martin was an SVP. Dr. Alanbaugh continued to believe he was not.

In August 2008, in response to a petition from St. Martin, the Office of Administrative Law (OAL) determined the 2007 version of the Department's protocol contained underground regulations. (2008 OAL Determination No. 19 (Aug. 15, 2008) pp. 3, 5, 10, 13 <http://www.oal.ca.gov/Determinations_Issued_in_2008.htm > (as of Nov. 16, 2010) (OAL determination). Although not verifiable from the record, the parties agree Dr. Alanbaugh and Dr. Scherrer likely conducted the initial evaluations of St. Martin using the 2004 version of the protocol. The parties also agree the 2004 and 2007 versions of the protocol are substantively identical. Division Three of this court reviewed the two protocols and came to the same conclusion. (*In re Ronje* (2009) 179 Cal.App.4th 509, 516 (*Ronje*).) Division Three further agreed with the OAL's

determination that the 2007 protocol, and by implication the 2004 protocol, contained underground regulations. (*Id.* at pp. 516-517.)[4]

Shortly before trial, all four psychologists evaluated St. Martin once again using the Static-2002, which gives more consideration to a person's advancing age in assessing the person's recidivism risk. They also considered recent research finding lower recidivism rates for sexual offenders. Neither the results of the Static-2002 nor the lower recidivism rates caused any of the psychologists to change their opinions.

On the first day of trial, St. Martin filed a motion to dismiss the proceeding because the evaluations used to initiate it were invalid as they were based on a protocol containing underground regulations. He argued, absent valid evaluations, the district attorney was not authorized to file the recommitment petition and the trial lacked fundamental jurisdiction to decide it. Although St. Martin acknowledged an alternative remedy to dismissal would be to stay the proceeding to allow the Department to correct the problem, he argued this remedy would unreasonably delay the proceeding in violation of his due process rights. The superior court denied the motion.

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[4] A court may not consider an OAL determination in a court proceeding if: (1) the court proceeding involves the party who sought the OAL determination, (2) the court proceeding commenced before the party sought the OAL determination, and (3) the court proceeding requires resolution of the same issue addressed in the OAL determination. (Gov. Code, § 11340.5, subd. (e).) As St. Martin was the person who sought the OAL determination and this case commenced before he did so, we requested further briefing from the parties on the application of this statute. Both parties agree this appeal does not require us to resolve the same issue addressed in the OAL determination. We, therefore, conclude the statute does not apply to this case.

## DISCUSSION

### I

### A

As he did below, St. Martin contends the initial evaluators' use of an invalid protocol requires reversal of his recommitment because, absent evaluations based on a valid protocol, the district attorney lacked statutory authority to file the recommitment petition and the superior court lacked fundamental jurisdiction to decide it. We disagree.

Fundamental jurisdiction means the "legal power to hear and determine a cause." (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529 (*Pompa-Ortiz*).) Lack of fundamental jurisdiction, therefore, is " 'an entire absence of power to hear or determine the case, an absence of authority over the subject matter of the parties.' [Citation.]" (*People v. American Contractors Indemnity Co.* (2004) 33 Cal.4th 653, 660.) When a court lacks fundamental jurisdiction, the court's judgment is void and may be directly or collaterally attacked at any time. (*Ibid*.)

The use of evaluations based on an invalid protocol to initiate a proceeding under the Act is irregularity in the preliminary stage of the proceeding. (*Ronje, supra*, 179 Cal.App.4th at p. 517.) An irregularity in the preliminary stage of a proceeding under the Act does not deprive a superior court of fundamental jurisdiction. (*Pompa-Ortiz, supra*, 27 Cal.3d at p. 529; *Ronje*, at p. 517; *Wright, supra*, 128 Cal.App.4th 663, 673.) Thus, the use of evaluations based on an invalid protocol to initiate the recommitment proceeding against St. Martin did not deprive the superior court of fundamental jurisdiction to hear and decide the matter.

The California Supreme Court's decisions in *People v. Superior Court* (*Ghilotti*) (2002) 27 Cal.4th 888 and *People v. Allen* (2007) 42 Cal.4th 91 (*Allen*) do not alter our conclusion. In *Ghilotti*, the Department's designated evaluators determined the respondent did not qualify as an SVP. (*Ghilotti*, at p. 905.) The Department disagreed with the evaluations because, despite the evaluators' determination, the evaluations suggested respondent was, in fact, likely to reoffend if released unconditionally. Consequently, the Department requested and the district attorney filed a petition for respondent's recommitment. (*Id.* at pp. 893-894.) Although concerned the evaluators might have misapplied the SVP criteria, the superior court dismissed the petition and ordered the respondent's release, finding the district attorney may not file a petition disregarding the designated evaluators' determination. The appellate court subsequently denied a petition for writ of mandate to vacate the dismissal order. (*Id.* at p. 894.)

The Supreme Court reviewed the matter and concluded the district attorney could not file a commitment or recommitment petition unless two mental health professionals concurred the respondent " 'has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody. [Citation.]" (*Ghilotti*, *supra*, 27 Cal.4th at p. 894.) However, the Supreme Court also concluded that, upon request, the superior court could review an evaluation, whether for or against commitment, for material legal error. (*Id*. at p. 895.) If the superior court found material legal error on the face of an evaluation, it must order the erring evaluator to prepare a new or corrected evaluation. (*Ibid*.)

If, as St. Martin contends, the lack of two valid evaluations deprives a superior court of fundamental jurisdiction, then the superior court would not have the power to conduct the review authorized by the Supreme Court, or to order a new or corrected evaluation. Accordingly, *Ghilotti* supports rather than undermines our conclusion that the faulty evaluations in this case did not deprive the superior court of fundamental jurisdiction.

In *Allen*, the California Supreme Court interpreted the Mentally Disordered Offenders Act (Pen. Code, § 2960 et seq.) to conclude the district attorney's untimely filing of a petition for recommitment precluded the superior court from extending the respondent's commitment. (*Allen*, *supra*, 42 Cal.4th at pp. 94-95.) The same rule applies to an untimely petition filed under the Act. "In general, the only act that may deprive a court of jurisdiction [under the Act] is the People's failure to file a petition for recommitment before the expiration of the prior commitment." (*People v. Whaley* (2008) 160 Cal.App.4th 779, 804.) In this case, however, the district attorney timely filed the petition to recommit St. Martin. Therefore, *Allen* is simply inapposite.

B

Although an irregularity in the preliminary stage of a proceeding under the Act does not deprive the superior court of fundamental jurisdiction to hear and determine a commitment or recommitment petition, the irregularity can cause the court to act in excess of jurisdiction. (*Medina*, *supra*, 171 Cal.App.4th at p. 816.) If the irregularity is addressed pretrial, the respondent is not required to show actual prejudice as the error can be corrected expeditiously. (*Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529; *Ronje*, *supra*, 179

Cal.App.4th at pp. 517-518.) Conversely, if the irregularity is not corrected before trial and is raised as an issue on appeal, the irregularity does not require reversal unless the respondent shows he was deprived of a fair trial or was otherwise prejudiced in his ability to mount a defense. (*Pompa-Ortiz*, at p. 529; *Medina*, at pp. 818-819; *Wright, supra*, 128 Cal.App.4th at p. 673.)

1

St. Martin does not argue the irregularity deprived him of a fair trial nor would the record support such an argument. Instead, the record shows St. Martin was represented by counsel at trial, his counsel thoroughly cross-examined the People's witnesses, and his counsel presented numerous witnesses on St. Martin's behalf, including countervailing experts. From these facts, we may conclude St. Martin received a fair trial. (*Wright, supra*, 128 Cal.App.4th at p. 673.)

2

The record also does not show the irregularity prejudiced St. Martin's ability to mount a defense. In fact, by the time of trial, the initial evaluations had lost much of their importance as Dr. Alanbaugh had changed her opinion, and St. Martin had been evaluated at least 11 more times: three times each by Drs. Alanbaugh, Vognsen, and Hupka, and two times by Dr. Scherrer. The additional evaluations provided the jury with comprehensive and current information upon which to base its verdict. Likewise, and more to the point, the additional evaluations ensured St. Martin had comprehensive and current information upon which to prepare his defense. His counsel's thorough cross-

examination of the People's witnesses and presentation of numerous lay and expert witnesses on his behalf amply demonstrate he was, indeed, able to mount a defense.

3

Nonetheless, St. Martin contends he was prejudiced because, had the superior court found the evaluations to be ineffective, the Department would have been required to appoint new evaluators to conduct new evaluations. Further, according to him, the Static-99 actuarial assessment tool used by all of the evaluators has since been revised and his score on that instrument would now be one point lower due to his age.[5] He contends the lower score, coupled with recent studies revealing lower recidivism rates for sexual offenders, make it reasonably probable he would have received more favorable evaluations.

We conclude St. Martin has waived this contention because his motion to dismiss specifically argued against providing the Department with an opportunity to correct the faulty evaluations as he believed this remedy would unreasonably delay his trial. Even if he had not waived this contention, we conclude there is no merit to it.

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5 St. Martin requests we take judicial notice of a paper dated January 4, 2010, entitled, "Static-99R: Revised Age Weights." The paper describes age-related revisions to the Static-99 effective January 5, 2010. St. Martin offers this paper as evidence he might have received more favorable evaluations had the superior court ordered new evaluations before trial. We deny the request for judicial notice as it would improperly augment the record on appeal to add material not part of the superior court record. (See *People v. Jones* (1997) 15 Cal.4th 119, 171, fn. 17, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) Further, we note the date of the revisions precludes any possibility they would have affected a pretrial reevaluation of St. Martin.

Preliminarily, we note the contention rests on a false premise as St. Martin provides no authority for his assertion that, after adopting a new protocol, the Department would have been required to appoint new evaluators to evaluate him. The governing statute only provides for the appointment of new evaluators if there is a disagreement among the initial evaluators. (§ 6601, subd. (f).) There is no provision for a change in evaluators because of a change in the protocol. Therefore, had the superior court ordered St. Martin to be reevaluated under a properly adopted protocol, the existing evaluators likely would have performed the reevaluations. This appears particularly true since the existing evaluators continually reevaluated St. Martin throughout the superior court proceedings.

In addition, none of the evaluators based their opinions solely or even predominantly on the Static-99 results. They also considered the results of other actuarial instruments as well as other static and dynamic factors, including St. Martin's inability to complete outpatient treatment and his refusal to participate in inpatient treatment. Moreover, before trial, all of the evaluators reevaluated St. Martin using the Static-2002 actuarial assessment, which gives greater recognition to the fact a person's age reduces the person's recidivism risk. The evaluators also considered recent research showing lower recidivism rates for sexual offenders. Neither the results of the Static-2002 nor the lower recidivism rates caused any of the evaluators to change their opinions. In fact, in response to specific questions by the People, two of the evaluators, Dr. Vognsen and Dr. Scherrer, testified St. Martin's case was not a close call for them. While the People did not ask Dr. Hupka a similar question, it is clear from his testimony, particularly his

remarks about St. Martin needing treatment and being an unsuitable candidate for outpatient treatment, that he felt as strongly about his conclusions as Drs. Vognsen and Scherrer did theirs.

Because each evaluator, using similar methodologies, conducted at least three pretrial evaluations of St. Martin, because their last evaluation included greater consideration of St. Martin's age as a mitigating factor as well as the research showing lower recidivism rates for sexual offenders, and because the evaluators were all firm in their opinions about St. Martin's recidivism risk, we cannot conclude it is reasonably likely St. Martin would have received more favorable evaluations had the evaluators been required to reevaluate him one more time using a properly adopted protocol. We find this particularly true as the Department's current protocol, part of emergency regulations that became operative a few months before St. Martin's trial, requires only that evaluators, according to their professional judgment, "apply tests or instruments along with other static and dynamic risk factors when making [their] assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis." (Cal. Code Regs., tit. 9, § 4005.) This is essentially the protocol followed by all of the evaluators in this case. Accordingly, St. Martin has not established the irregularity prejudiced him.

C

As St. Martin has not shown prejudice from the irregularity, his alternative contention that his trial counsel provided him with ineffective assistance necessarily fails.

(*Strickland v. Washington* (1984) 466 U.S. 668, 687, 697 [Claim of ineffective assistance of counsel requires a showing of both deficient performance and prejudice. If a defendant fails to show prejudice, the claim fails and the court need not decide whether counsel's performance was deficient.].)

II

St. Martin next contends that, in light of the California Supreme Court's decision in *McKee*, we should remand this case to the superior court to determine whether the statute under which he was committed violates the equal protection clause. The People acknowledge that the results of the *McKee* case, which are not final, may affect the superior court's judgment in this case. Rather than remand the case to the superior court, however, the People request we suspend further proceedings until the *McKee* case is finally resolved.

We conclude the appropriate course under the circumstances is to reverse the superior court's judgment solely as to the *McKee* claim, remand the matter to the superior court, direct the superior court to suspend further proceedings on the claim until the *McKee* case is finally resolved, and then conduct further proceedings consistent with the final resolution.

III

Solely for purposes of later federal court review, St. Martin contends the Act violates the federal constitution's due process, ex post facto, and double jeopardy clauses. As he acknowledges in his opening briefing, the California Supreme Court has decided against his position on these points. (*McKee*, *supra*, 47 Cal.4th at pp. 1184, 1193-1195.)

The California Supreme Court's decision is binding on us. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 455.)

DISPOSITION

The judgment is reversed solely as to St. Martin's *McKee* equal protection claim. The matter is remanded to the superior court and the superior court is directed to suspend further proceedings on the *McKee* equal protection claim until the *McKee* case is finally resolved. The direction to suspend further proceedings does not preclude the superior court from consolidating or coordinating this case with other cases raising *McKee* equal protection claims, or from taking other similar steps necessary for the efficient administration of the superior court proceedings. Once the *McKee* case is finally resolved, the superior court is directed to conduct further proceedings consistent with the final resolution. In all other respects, the judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

IRION, J.